
No. 19-1004

IN THE

SUPREME COURT OF THE UNITED STATES

Spring 2020

In re Tumbling Dice, Inc. et al., Debtors

TUMBLING DICE, INC. *ET AL.*,

Petitioner,

v.

UNDER MY THUMB, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a debtor in possession is permitted to assume an executory intellectual property contract over the objection of the non-debtor party where applicable nonbankruptcy law applies.

2. Whether 11. U.S.C. §1129(a)(10) requires the proponent of a joint, multi-debtor plan to obtain acceptance of a single impaired class of creditors under the plan (i.e., per plan approach) or, alternatively, whether acceptance from at least one impaired class of creditors of each debtor (i.e., per debtor approach) is required.

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The Bankruptcy Court for the Thirteenth Circuit held that Tumbling Dice, Inc. could assume the licensing agreement with Under My Thumb, Inc. and that 11 U.S.C. §1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. R. 9. The Bankruptcy Appellate Panel for the Thirteenth Circuit affirmed the bankruptcy court on both issues. R. 9. The United States Court of Appeals for the Thirteenth Circuit reversed the decision of the Appellate Panel, holding that Tumbling Dice, Inc. may not assume the agreement and that 11 U.S.C. §1129(a) requires jointly administered plans be analyzed on a per debtor, not a per plan, approach. R. 15, 20, 21.

JURISDICTIONAL STATEMENT

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following Constitutional and statutory provisions pertain to the facts of this case and are set forth, in relevant part, in Appendices A–D: 11 U.S.C. §102(7), 11 U.S.C. §365(c)(1), 11 U.S.C. §1101, 11 U.S.C. §1107, 11 U.S.C. §1129(a)(10), 35 U.S.C. §154(a)(1).

STATEMENT OF FACTS

Tumbling Dice, Inc. ("TDI" or "Debtor") is a holding company that was formed to own the membership interests of its nine wholly-owned debtor-subsidiaries. R. 4. Eight of those subsidiaries each operate a luxury casino and resort (collectively, the "Operating Debtors"), while the remaining debtor-subsidiary, Development LLC ("Development") acts as a licensee under a non-exclusive software agreement with Respondent, Under My Thumb ("UMT"). R. 4. In 2008, TDI contract with UMT, a software designer, to help modernize TDI's customer rewards and loyalty program. *Id.* After the Software was complete, TDI and UMT entered into a license agreement (the "Agreement") that granted Tumbling Dice a non-exclusive license to use its copyrighted and patented Software and permitted TDI's Development to "extend the benefits of the Agreement to its affiliated entities only" even though such entities were not parties to the Agreement. R. 5. The two parties, both well versed in contracting, included an *ipso facto* clause in the Agreement, which prohibited the Debtors from assigning their rights to other non-debtor parties without UMT's express consent. *Id*.

In exchange for the license, TDI agreed to pay UMT a monthly fee that was calculated based on the amount of spending activity by the loyalty program members. *Id*. The Software was a big success for TDI and in turn, UMT. *Id*. UMT was granted permission to, and took advantage of its ability to license similar versions of the Software to third parties. *Id*. It also received higher payments than expected under the Agreement each month due to the increased popularity of the loyalty program. *Id*.

In December 2011, TDI's stock was purchased by a hedge fund, Start Me Up, Inc. ("SMU") R. 6. In light of the non-exclusive nature of the Software license and the restrictive covenants in the loan agreement, the Lenders did not require TDI to act as a borrower under the

credit facility. *Id.* However, due to a significant and unserviceable amount of debt that resulted from the buy-out transaction, TDI filed for Chapter 11 bankruptcy in January 2016. R. 6. TDI acknowledged in their filings that negotiating a deal with the Lenders to restructure and refinance their debt was the primary goal in these bankruptcy cases. *Id.* Despite this large debt, TDI remained current with the payments due under the Agreement. *Id*. After extensive negotiations, a plan ("Plan") had been created to restructure all of TDI's debt. R. 7. With respect to UMT, the Plan proposed that TDI assume (not assign) the Agreement under sections 365 and 1123(b)(2), which would allow UMT to continue to receive the monthly payments for TDI's use of the Software under the Agreement. *Id*. The Plan also provided for a distribution of $66 million, that included paying $6 million plus obligation owed by TDI to UMT under a separate note. *Id*.

Initially, UMT viewed the Plan favorably. R. 7. However, when UMT reviewed the disclosure statement, it learned that Start Me Up, Inc. was only funding less than half of the distribution. *Id.* The remaining $35 million was being funded by Sympathy for the Devil, LP ("SFD"), a private equity group. R. 8. In return, SFD, a direct competitor of UMT, would receive 51% of Tumbling Dice's shares of the reorganized TDI. *Id.*

The Plan enjoyed almost unanimous support from all creditor groups. R. 8. After the creditor ballots were reviewed, TDI had at least one impaired accepting class of creditors. *Id*. Concerned with SFD's potential access to the Software, UMT later voted to reject the Plan, which has resulted in Development without an impaired accepting class of creditors. *Id*. UMT timely objected and argued two issues on appeal.

SUMMARY OF THE ARGUMENT

There are two issues before the Court today. First, whether a debtor in possession is permitted to assume an executory intellectual property contract over the objection of the non-debtor party where applicable nonbankruptcy law applies. Second, whether 11. U.S.C. 1129(a)(10) requires the proponent of a joint, multi-debtor plan to obtain acceptance of a single impaired class of creditors under the plan (i.e., per plan approach) or, alternatively, whether acceptance from at least one impaired class of creditors of each debtor (i.e., per debtor approach) is required. Petitioners, Tumbling Dice Inc., respectfully ask that this Court *reverse* the decisions of the Thirteenth Circuit Court of Appeals *on both issues*.

Reversal on these issues would result in two findings: first, for a finding that 11 U.S.C. § 365(c)(1) permits a debtor in possession to assume a non-exclusive patent license absent non-debtor consent because 11 U.S.C. §365(c)(1) does not apply to a debtor in possession; and second, for a finding that under 11 U.S.C. §1129(a)(10), the *per plan* approach is most appropriate because it provides the most benefit to debtors, employees, shareholders, and creditors alike.

ARGUMENT

As neither party challenges the lower court's findings of fact, the only issues before this Court are conclusions of law. R. 9. Conclusions of law are subject to *de novo* review, and this Court need not afford any deference to the lower court in this respect. *Keach v. United States Trust Co.*, 419 F.3d 626, 634 (7th Cir. 2005) (citation omitted).

I. THE DECISION OF THE THIRTEENTH CIRCUIT SHOULD BE REVERSED BECAUSE 11 U.S.C. § 365(c)(1) PERMITS A DEBTOR IN POSSESSION TO ASSUME A NON-EXCLUSIVE PATENT LICENSE

Petitioner, Tumbling Dice, Inc. ("TDI"), urges this Court to overturn the decision of the Thirteenth Circuit Court of Appeals ("Thirteenth Circuit") and permit TDI to assume key licensing software with Respondent, Under My Thumb ("UMT"), absent UMT's consent. TDI entered into a non-exclusive licensing agreement ("Agreement") for intellectual property that granted TDI and its affiliated entities the use of the Club Satisfaction software in exchange for paying UMT a monthly fee. R. 5. This software modernized TDI's customer loyalty and was a tremendous success for TDI. *Id.* The software and the Agreement quickly became critical to the success of TDI's customer satisfaction and overall business operations. *Id.* While TDI remained current in its payments to UMT, eventually TDI became burdened by an unserviceable amount of debt and filed for Chapter 11 in January 2016. R. 6.

In traditional Chapter 11 filings, the debtor becomes a debtor in possession immediately upon filing for bankruptcy, unless a trustee has been appointed. 11 U.S.C. § 1107, *et seq*. "A debtor in possession under Chapter 11 is permitted to continue to operate all aspects of its business, unless continued possession is not in the best interest of the estate." *In re Interco, Inc.*, 135 B.R. 631 (Bankr. E. D. Mo. 1992). 11 U.S.C. §1107(a) grants the debtor in possession the same rights and powers of a trustee. *In re Footstar, Inc.*, 323 B.R. 566, 573 (Bankr. S.D.N.Y.

2005). When the debtor in possession elects to assume an executory contract that happens to be a patent license, tension arises between bankruptcy law and applicable patent law. General patent law grants the patent owner the "right to exclude" the use or selling the "invention," or in our case, the Club Satisfaction software. 35 U.S.C. §154(a)(1). Thus, the debtor in possession provides for a debtor and its management to take on the role of a "debtor in possession." 11 U.S.C. § 1101, *et seq*. 11 U.S.C. §365 provides a debtor in possession with the power to assume receiving benefits of an executory contract while still continuing to perform its obligations under the contracts held by the debtor before bankruptcy. 11 U.S.C. §365(a).

The lower court contends that this right is limited by section 365(c)(1). 11 U.S.C. §365(a) explicitly states that the trustee, "subject to the Court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. §365(a). When attempting to assume a patent license, problems arise due to conflicts between Intellectual Property law and Bankruptcy law. 11 U.S.C. §365(c)(1) provides:

> (c) The Trustee may not assume or assign any executory contracts. . . if-
> (1)
> (A) applicable law excuses a party, other than the debtor, to such contract. . . From accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession; and
> (B) such party does not consent to such assumption or assignment

11 U.S.C. §365(c)(1). In our case, TDI is attempting to assume, not assign, the Agreement. R. 5 The lower court incorrectly applied this section of the bankruptcy code unto the Agreement between TDI and UMT by preventing the plan to go through because of applicable patent law which gives the "right to exclude" to the licensor. 35 U.S.C. §154(a)(1).

A. The Plain Meaning Of 365(C) Does Not Apply To A Debtor In Possession.

This Court should overturn the Thirteenth Circuit's decision because it erroneously focused on the plain meaning interpretation of the word "or" rather than "trustee" in 11 U.S.C.

§365(c)(1). According to the lower court, the phrase "the trustee may assume or assign" in 11 U.S.C. §365(c) uses the disjunctive term "or" to mean that a debtor in possession can neither assume nor assign an executory contract under applicable law absent consent from the non-debtor party. R. 22. However, by exclusively focusing on the term "or" the lower court fails to interpret the most dispositive statutory language of 11 U.S.C. §365(c)(1), the term "trustee." *In re Footstar, Inc.*, 323 B.R. 566, 570 (Bankr. S.D.N.Y. 2005). According to the lower court's interpretation, by substituting the term "trustee" with the term "debtor in possession," the statute reads, "the *debtor in possession* may not assume … *any* contract if … applicable law excuses [the counterparty] … from accepting performance from or rendering performance to an entity *other than the debtor in possession*...." *Id.* at 573.

In *In re Footstar*, a Chapter 11 debtor in possession attempted to assume multiple, very profitable contracts with a popular retailer. *In re Footstar, Inc.*, 323 B.R. at 568. However, the retailer objected on the grounds that the contracts were allegedly not assignable under applicable nonbankruptcy law. *Id.* This is significant because as the *Footstar* court notes, a debtor in possession's ability to assume profitable contracts is essential for the debtor's ability to reorganize. *Id*. Further, the assumption of the contracts would allow for full payment to the debtor's creditors. *Id*. If the debtors fail to assume, the result would likely be liquidation of the debtors and only partial payment to the creditors. *Id.*

The court *In re Footstar* states that three Circuit Courts have interpreted the statutory language of 11 U.S.C. §365(c)(1) in accordance with its "plain meaning," but in doing so, are focusing on the wrong language of the statute. *Id.* at 570. *Footstar*'s inquiry focuses on the word "or" and whether the statute should read "assume or assign," or "assume and assign." *Id.* The court held that the statute "can and should be construed in accordance with its 'plain meaning' to

reach a conclusion which is entirely harmonious with both the objective sought to be obtained in 11 U.S.C. §365(c)(1) and the overall objectives of the Bankruptcy Code." *Id*. The argument that the court uses explains the key word in the statute is "trustee." *Id*. The statute does not say that the debtor in possession may not assume or assign the executory contract. *Id*. The statute, on its face prohibits the "trustee." *Id*. The court further states that the Bankruptcy Code never defines "trustee" to be synonymous with "debtor" or "debtor in possession." *Id.* at 571. Actually, when the Bankruptcy Code refers to both "trustee" and "debtor" or "debtor in possession" in the same section, the two terms must have quite different meanings. *Id*. A trustee is only appointed by a court. *Id*. The court concluded that the debtor and the trustee in a Chapter 11 case "are entirely different parties."

In re Footstar is synonymous with the present matter. Similarly, TDI filed joint Chapter 11 cases. R. 7. TDI was attempting to assume its very profitable patent license that it had with UMT. R. 7. UMT objected to the plan on the grounds that the agreement could not be assumed without its consent pursuant to 11 U.S.C. §365(c)(1) and applicable patent law that prevented assumption without UMT's explicit consent. R. 8. The lower court incorrectly held that the objection was valid, rejecting the plan by finding that 11 U.S.C. §365(c)(1) proscribed TDI from assuming the Agreement. R. 9. Significantly, the record indicates that there was no trustee ever appointed by the court. R. 8-9. Therefore, interpreting the plain meaning of 11 U.S.C. §365(c)(1) to mean different parties still could not prevent TDI from assuming the agreement, because TDI is not a trustee. TDI is merely the debtor in possession and should be able to assume the beneficial contracts under the Agreement in order to facilitate a successful reorganization. R. 7. For these reasons, the lower court's decision should be overturned as the court incorrectly

interpreted the plain meaning of 11 U.S.C. §365(c)(1) to apply limitations upon TDI as a trustee, when TDI remains the debtor in possession

B. Construing 365(c)(1) to bar assumption of an executory contract is inconsistent with the "Actual Test" and Bankruptcy Code's purpose of assisting successful debtor reorganization

If this Court decides to reject the argument set forth in *Footstar*, the statute should nonetheless be interpreted to read "assume and assign" rather than "assume or assign." A debtor can assume a contract for itself and perform it, or it can assume the contract and assign it to a third-party assignee, including the trustee. R. 23. The first circumstance arises when parties attempt to assign contracts and the second arises when there is debate upon whether the assumption should be prohibited where no assignment is actually sought. Jennifer Ying, Comment, *The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1225, 1254 (2010).

The "hypothetical" and "actual" tests have emerged due to two situations which commonly arise in Chapter 11 bankruptcy filings which require the application of 11 U.S.C. §365(c). The "hypothetical test" prohibits a debtor in possession from assuming an executory contract under 11 U.S.C. §365(c)(1) as a matter of law when the non-debtor party is excused from performing under the contract and has not consented to this assumption. *N.C.P. Mktg. Group, Inc. v. BG Star Prods.*, 556 U.S. 1145, 1146 (2009). The "actual test" analyzes the executory contract on a case by case basis. *Summit Inv. & Dev. Corp v. Leroux*, 69 F.3d 608, 612 (1st Cir. 1995). Unlike the "hypothetical test," the "actual test" works to determine if the non-debtor party's contract will be assigned, or alternatively, whether the non-debtor will accept or render performance to *any* party, including the trustee, with whom the non-debtor originally contracted. *Id.*

The majority of the circuits have adopted the "hypothetical test" when interpreting 11 U.S.C. §365(c)(1), suggesting that "if the debtor in possession lacks hypothetical authority to assign a contract, then it may also not assume the contract, even if the debtor in possession has no legitimate intention of assigning the contract." *See In re West Elec., Inc.*, 852 F.2d 79, 83 (3rd Cir. 1988); *Perlman v. Catapult Ent., Inc. (In re Catapult Ent., Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999). For example, the *West* court examined whether West, the debtor, was precluded from assumption, examining whether the contract could be hypothetically assigned to another defense contractor. *In re West Elec., Inc.*, 852 F.2d at 80. In *In re West Elec., Inc.*, West had an executory contract with the U.S. government. *Id*. The government suspended progress payments on the contract to West following a review of West's financial status after an accidental destruction of West's financial records. *Id*. After an investigation, the government decided to suspend the contract completely. *Id*. The Third Circuit ruled that West *could not* assign the contract because West could not force the government to accept future services of a third party without its consent. *Id.* at 83 (emphasis added).

Subsequently, the Ninth Circuit held in *In re Catapult Ent., Inc.* that a debtor in possession could not assume patent licenses where applicable law prohibited the assignment because the identity of the non-debtor party was material. *In re Catapult Ent., Inc.*, 165 F.3d at 750. The non-debtor party was material in *In re Catapult Ent., Inc.* because the non-debtor party would essentially be considered competition, potentially resulting in another company using the patents. *Id.* at 755. While these two cases might appear to be appropriate uses of the "hypothetical test," their fact patterns actually illustrate why the "hypothetical test" should not be applied.

Despite the lower court's decision to apply the "hypothetical test," a circuit split exists because other circuits have adopted the well-reasoned rationale of the "actual test." R. 22. For example, in *Leroux,* the First Circuit ruled that should non-debtor parties fail to receive the "full benefit of the bargain" from the debtors due to an *actual* conflict of interest, then the contract would not be assumable. *Leroux,* 69 F.3d at 614 (emphasis added). An actual conflict of interest would amount to a direct conflict between one party's actions and duties to another entity that affects performance. *Mickens v. Taylor*, 535 U.S. 162, 172-73 (2002). In *Leroux,* Leroux, the debtor, filed suit against Summit alleging that Leroux's contract rights were not terminated solely because Leroux instituted Chapter 11 bankruptcy proceedings. *Id.* at 609. Summit, the creditor, alleged that an inherent conflict of interest arises when Leroux and his partner owed conflicting fiduciary duties to both of their co-partners and to their Chapter 11 creditors. *Id.* at 613. The First Circuit rejected the argument that there was a conflict of interest because of this Court's precedent that states the pre-petition debtor and the post-petition debtor are the same legal entity. *Id.* at 614.

Where the debtor in possession seeks to assume, but not assign, an executory contract, the applicable law referenced in 11 U.S.C. §365(c)(1) is not triggered. *Leroux*, 69 F.3d at 613. *Leroux* aligns with our case because under the conditions of the Agreement, TDI would continue to use the Software and intellectual property license pursuant to the terms of the Agreement, and UMT would continue to receive the Debtor's monthly fee from using the Software. R. 26. When the Debtors filed for bankruptcy, TDI had never missed a payment nor violated any terms of the Agreement. *Id*. Debtors intended to fulfill all of their responsibilities under the contract, even after filing for bankruptcy. *Id*. TDI's intention to continue performance under the Agreement is illustrated by its ability to remain up to date on monthly payments to UMT and has never

defaulted on those payments. R. 6. Because UMT has no reason to doubt TDI's ability to assume performance under the Agreement, and because TDI has no intention to assign the contract to another party, the "actual test" rather than the "hypothetical test" is more appropriate given the facts of TDI's particular case.

C. Even if the language of 11 U.S.C. §365 (c)(1) is interpreted as the disjunctive "or," rather than the conjunctive "and," TDI should still be permitted to assume performance under the Agreement.

Even if the Court finds that the plain language of 11 U.S.C. §365(c)(1) should be read literally to mean "or" as a disjunctive (cannot assume or assign), such a reading fails to give effect to the statute's text as intended by Congress. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) (The court has the duty to "give effect, if possible, to every clause and word" of a statute). Instead, the statute should be construed by its "plain meaning" to conclude that constraint upon assumption is only imposed upon the "trustee" rather than the "debtor" or "debtor in possession." *In re Footstar Inc.*, 323 B.R. at 573. Since the "provisions and objectives of Chapter 11 are designed to foster, not frustrate, the reorganization and the economic well-being of debtors in possession" it is nothing short of erroneous to imply that under 11 U.S.C. §365(c)(1), the debtor or debtor in possession itself cannot assume any executory contract. *Id.* at 574.

Alternatively, if the statute remains ambiguous after a reading of the statute's plain text, the statute's legislative history can be used to determine Congress' intent. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Legislative history demonstrates that Congress even proposed to clarify and amend 11 U.S.C. §365(c)(1) to replace "trustee" with "an entity other than the debtor or the debtor in possession." H.R. Rep. No. 96-1195, at 57 (1980).

Congress explained in a report that:

> "This amendment makes clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract."

Id. at 12. Congress made this revision to 11 U.S.C. §365(c)(1) in 1984, after enacting the Bankruptcy Technical Correction Act of 1980. *Id.* Such an action can only be said to further demonstrates with great clarity Congress' intent to allow a debtor in possession to assume an executory contract, even without consent from the non-debtor party or applicable law. R. 25.

In conclusion, the decision of the Thirteenth Circuit should be reversed for a finding that a debtor in possession is not limited by the language of U.S.C. 365(c) and is in fact permitted to assume the non-executory key licensing agreement, absent consent from the non-debtor party.

II. THE DECISION OF THE THIRTEENTH CIRCUIT SHOULD BE REVERSED BECAUSE 11 U.S.C. § 1129(A)(10) REQUIRES ACCEPTANCE FROM AT LEAST ONE IMPAIRED CLASS OF CLAIMS OF ANY ONE DEBTOR

The decision of the Thirteenth Circuit should be reversed because it inappropriately followed the *per debtor* approach rather than the *per plan* approach. Application of the *per debtor* approach constituted a misinterpretation of 11 U.S.C. §1129(a)(10) of the Bankruptcy Code because the lower court misconstrued terms of the statute to make it read differently than what Congress intended when writing the statute. As such, the plain language of 11 U.S.C. §1129(a)(10) of the Bankruptcy Code states that a court must confirm a plan "[i]f a class of claims is impaired under the plan, *at least one class* of claims that is impaired under the plan has accepted the plan. . . ." 11 U.S.C. §1129(a)(10)(2010) (emphasis added). Although UMT urges the Court to apply the *per debtor* approach, the Code provides no distinction between creditors of different debtors under the plan. *Id.* This is not an ambiguity in the text of the section but rather an indication of congressional intent.

The Bankruptcy Code provides the court shall confirm a plan only if the requirements under 11 U.S.C. §1129 are all met. 11 U.S.C. §1129(a)(10) explicitly provides:

> (a) The court shall confirm a plan only if all of the following requirements are met-
> (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan. . .

When there is not a joint plan for multiple debtors and creditors this becomes a simple equation as to whether or not the one impaired class of claims has accepted the plan. However when the Chapter 11 plan is a joint plan for multiple debtors and creditors who hold claims against different debtors, the question then becomes, does acceptance by any one class of impaired creditors with claims against any one of the debtors satisfy 11 U.S.C. §1129(a)(10) or does the code require acceptance by an impaired class of creditors of each debtor that is a party to the plan? *JPMCC 2007-c1 Grasslawn Lodging LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 729 (9th Cir. 2018). The latter is referred to as the *per debtor* approach, while the former refers to the *per plan* approach. *Id.* Given the plain language in 11 U.S.C. §1129(a)(10), this Court should adopt the *per plan* approach and overturn the Thirteenth Circuit's decision as majority failed to apply the *per plan* approach and incorrectly applied the *per debtor* approach.

A great majority of lower courts have adopted the *per plan* approach. *In re Station Casinos, Inc.*, Nos. BK-09-52477, BK 10-50381, BK 09-52470, BK 09-52487, 2010 Bankr. LEXIS 5380 (Bankr. D. Nev. Aug. 27, 2010). The earliest case to support the *per plan* interpretation of 11 U.S.C. §1129(a)(10) is in *In re SGPA, Inc.*, No. 1-01-026092, 2001 WL 3450646 (Bankr. M.D. Pa. September 28, 2001). In *SGPA*, the bankruptcy court overruled the creditors objection to 11 U.S.C. §1129(a)(10) and confirmed a joint plan. *Id*. The bankruptcy

court held that it was unnecessary "to have an impaired class of creditors of each debtor vote to accept the Plan." *Id*. Subsequently, *In re Enron*, in an opinion that was marked "Not for Publication," the bankruptcy court decided that the plain statutory meaning of 11 U.S.C. §1129(a)(10) is to be interpreted as *per plan*. *In re Enron*, No. 01-16034, 2004 Bankr. Lexis 2549 (Bankr. S.D.N.Y July 15, 2004). In *JPMorgan Chase Bank, N.A. v. Charter Commc'ns. Operating, LLC (In re Charter Commc'ns)*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009), the court again held that 11 U.S.C. §1129(a)(10) is to be applied as *per plan* rather than *per debtor*. The court held that the proposal of a joint plan was reasonable and administratively convenient, given that the debtors' business was managed by their ultimate corporate parent on an integrated basis." *Id.* at 266.

These cases all involved debtors proposing a joint plan of reorganization and that plan being accepted by numerous impaired classes. All of the courts above have held that acceptance by at least one impaired class satisfies 11 U.S.C. §1129(a)(10) and confirmed the plan. Here, the plan enjoyed near universal support from all creditor groups. R. 8. The only creditor to not accept the plan was UMT. R. 9. The majority of courts would likely conclude that UMT's objection should be dismissed, and the Plan should be confirmed under the *per plan* approach.

A. The Plain Language Of 1129(A)(10) Requires Acceptance By Only One Impaired Class Of Creditors Under The Plan.

This Court should overturn the Thirteenth Circuit's decision because the lower court's interpretation of the statute is inconsistent with the plain meaning of section 1129(a)(10). In order to interpret a statute, we must first turn to the statutory language itself. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. at 438. This Court correctly stated in *Lamie v. U.S. T.R.*, 540 U.S. 526 (2004), "[w]hen the statute's language is plain, the sole function of the court-at least where the disposition required by the text is not absurd- is to enforce it according to its terms." *Id.* at 534.

In *Contra Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000), this Court said, "Congress says in a statute what it means and means in a statue what it says there." The plain language of the section states "[t]he court shall confirm a plan only. . . [i]f a class of claims is impaired under the plan, *at least one class* of claims that is impaired under the plan has accepted the plan. . ." 11 U.S.C. §1129(a)(10). This language is clear and unambiguous as it states that only *one* impaired class under the plan must accept the plan.

1. The Plain Language Of 11 U.S.C. §1129(A)(10) States That The Joint, Multi-Debtor Plan Should Be Confirmed Because At Least One Impaired Class Of Creditors Accepted The Plan

The facts of this case fit within the plain language of 11 U.S.C. §1129(a)(10) of the Bankruptcy Code. TDI filed a joint Chapter 11 plan. R. 7. The plan enjoyed near universal support from all creditor groups. R. 8. When the votes were tallied up, TDI and each of the Operating Debtors had at least one impaired accepting class of creditors. R. 8. Development, however, had no impaired accepting class of creditors. R. 8. UMT objected to the Plan on grounds that 1129(a)(10) because no impaired class of creditors of Development had voted to accept it. R. 9. Although UMT voted against the plan, the plan was otherwise universally accepted and therefore satisfies the plain language of 11 U.S.C. §1129(a)(10). UMT's objection should be rejected, and the Thirteenth Circuit's decision should be reversed because it is contrary to the plain language of 11 U.S.C. §1129(a)(10). The Court's inquiry should end here.

2. 11 U.S.C. §102(7) Should Not Be Applied To Modify 11 U.S.C. §1129(A)(10) So That "The Singular Includes The Plural," Because At Least One Impaired Class Of The Debtors' Creditors Accepted The Plan.

UMT claims that interpreting 11 U.S.C. §1129(a)(10) alongside 11 U.S.C. § 102(7), which provides that you must interpret the Bankruptcy Code as "the singular includes the plural," provides support for the *per debtor* approach. R. 19. However, even if 11 U.S.C.

§1129(a)(10) is modified to transform the singular terms into the plural, the statute still reads "[i]f classes of claims are impaired under the plans, at least one of the classes that are impaired under the plans has accepted the plans. . . " R. 28. Further, if 11 U.S.C. §1129(a)(10) is modified to change the singular to the plural, the result remains unchanged because "at least one" of the impaired classes of the Debtors' creditors had still accepted the plan when it was universally accepted, notwithstanding UMT.

B. This Court Should Adopt the *Per Plan* Approach Because Even If The Language Of 11 U.S.C. §365 (C)(1) Is Interpreted As The Disjunctive "Or," Rather Than The Conjunctive "And," TDI Is Still Be Permitted To Assume Performance Under The Agreement.

Little case law currently addresses the question of whether the courts should adopt the *per plan* approach or the *per debtor* approach. This is unsurprising, given that the plain language of 11 U.S.C. §1129(a)(10) is often considered "clear and unambiguous." *In re Transwest Resort Props., Inc.*, 881 F.3d at 729. The majority of bankruptcy courts that have addressed the issue have therefore applied 11 U.S.C. §1129(a)(10) in accordance with its plain meaning, suggesting a *per plan* approach of acceptance from only one impaired class of creditors. *Id.*

Most recently, in *Transwest,* five related entities commenced Chapter 11 bankruptcy. *In re Transwest Resort Props.*, 881 F. 3d at 726. Transwest Resort Properties Inc. was the debtor holding company and the sole owner of two Mezzanine debtors. *Id.* The five debtors filed a joint Chapter 11 plan, which was approved by several classes of impaired creditors, none of which held claims against the Mezzanine debtors. *Id.* The lender voted to reject the plan and, thus, no class of impaired creditors of the Mezzanine debtors voted to approve the plan. *Id*. The lender asserted that 11 U.S.C. §1129(a)(10) requires that "at least one impaired class accept the plan" applies on a *per debtor* basis not a *per plan* basis. *Id*.

The bankruptcy court approved the plan despite the lender's objections. *Id*. The district court affirmed the bankruptcy court's decision to apply the *per plan* approach and affirmed the bankruptcy court's confirmation of the plan. *Id.* at 727. The lender appealed and the Ninth Circuit affirmed the plan. *Id.* at 730. The Ninth Circuit correctly held that the plain language of 11 U.S.C. §1129(a)(10) indicates that Congress intended a *per plan* approach. *Id.* at 727. The court stated that 11 U.S.C. §1129(a)(10) "makes no distinction concerning or reference to the creditors of different debtors under 'the plan,' nor does it distinguish between single-debtor and multi-debtor plans." *Id.* The court reasoned that a plan satisfies 11 U.S.C. §1129(a)(10) when one at least a single impaired class of creditors accepts the plan. *Id*.

The present matter is very similar to *Transwest.* Here, the Debtors filed a joint Chapter 11 bankruptcy plan. R. 7. The plan enjoyed near universal support from all creditor groups. R. 8. When the votes were tallied, each of TDI and the Operating Debtors had at least one impaired accepting class of creditors. R. 8. Therefore, Development had no impaired accepting class of creditors. *Id.* UMT objected to the Plan, contending that pursuant to 11 U.S.C. §1129(a)(10), no impaired class of creditors of Development had voted to accept the plan. *Id.* By adopting the *per plan* approach, this Court should reject UMT's objection because 11 U.S.C. §1129(a)(10) is satisfied where at least one impaired class in a joint, multi-debtor plan accepts the plan. *In re Transwest Resort Props.*, 881 F. 3d at 730.

The lower court relies heavily on *In re Tribune Co.*, in which a Delaware bankruptcy court decision that applied 11 U.S.C. §1129(a)(10) differently than other bankruptcy court decisions. *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011). Here, *Tribune* is not persuasive for two significant reasons. First, *Tribune* involved voting on two competing plans of reorganization. *Id*. at 135. The *Tribune* court held that 11 U.S.C. §1129(a)(10) must be satisfied

by each debtor given the unique fact that there were multiple plans for a total of 111 debtors. *Id.* at 182. Here, there is one plan for the jointly administered Chapter 11 cases. R. 7.

Further, *Tribune* is inconsistent with case law that holds 11 U.S.C. §1129(a)(10) is a mere technical requirement for plan confirmation which confers no substantive rights on the objecting creditor. *See In re 7th St. & Beardsley P'ship*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994); *In re Bataa/Kierland, L.L.C.*, 476 B.R. 558, 577 (Bankr. D. Ariz. 2012). The bankruptcy court in *7th Street & Beardsley Partnership* held that the purpose of 11 U.S.C. §1129(a)(10) was merely to require "some degree of creditor support for a plan that is to be involuntarily imposed on another group of creditors." *In re 7th St. & Beardsley Partnership,* 181 B. R. at 431. 11 U.S.C. §1129(a)(10) therefore is a "technical requirement" and is not a "substantive right of objection creditors." *Id*. The most recent court in *Bataa/Kierland, L.L.C.* held the same, relying on *In re 7th St. & Beardsley Partnership*. *Bataa/Kierland, L.L.C.*, 476 B.R. at 578. In this case, the only debtor that did not have an impaired accepting class was Development, while the other impaired creditors universally voted to accept. R. 9. Therefore, 11 U.S.C. §1129(a)(10) was satisfied by at least one impaired class of creditors under the plan voting to accept the plan. *Id.* The *Tribune* court decision was therefore based on the incorrect notion that 11 U.S.C. §1129(a)(10) was created to protect the substantive rights of impaired classes of creditors and should be rejected. *Tribune*, 464 B.R. at 183.

C. The "*Per Plan*" Approach Should Be Applied Because It Is More Persuasive, Widely Accepted, And Allows Debtors To Continue Operations And Work Towards Repayment In Good Faith

This Court should adopt the well-reasoned rationale of the bankruptcy court and the Bankruptcy Appellate Panel ("BAP") in adopting the *per plan* approach. The *per plan* approach protects both debtors and creditors alike in allowing business to continue while creditors are

repaid after accepting a plan. *Toibb v. Radloff*, 501 U.S. 157, 165 (1991). Further, a *per plan* approach would be consistent with the majority of lower courts throughout the nation and the Ninth Circuit. *In re Transwest Resort Props., Inc.*, 881 F.3d at 729. While the Thirteenth Circuit finds a *per debtor* approach to be more persuasive because it is alleged to be more consistent with long standing opinion of American corporate law and creditor's rights, such an understanding is misleading. *See In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1995) (finding that section 1129(a)(10) is a technicality and provides no substantive rights to creditors). Despite the acceptance of the *per debtor* approach in Delaware, it cannot be said that the *per debtor* approach is more persuasive or more consistent with "long established principles of American corporate law." R. 20. In fact, the *per plan* approach is arguably more consistent with the Bankruptcy Code and the principles of Chapter 11 because it allows for debtor reorganization and preserves the jobs of those impacted by debtor bankruptcy, while slowly repaying creditors. *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291, at *19 (Bankr. M.D. Pa. Sep. 28, 2001) ("[Bankruptcy Code] section 1129(a)(10) is not an all-purpose creditor protection mechanism.").

1. This Court Should Adopt The *Per Plan* Approach Because Supreme Court Acceptance Of The *Per Plan* Approach Would Result In Consistency Among The Lower Courts.

This Court should reverse the decision of the Thirteenth Circuit and uphold the bankruptcy court's determination that a *per plan* approach should be applied, because the *per debtor* approach proves inconsistent with the holdings of many bankruptcy courts outside of Delaware. *See In re Transwest Resort Props., Inc.*, 881 F.3d at 729; *In re Transwest Resort Props., Inc.*, 554 B.R. 894, 899-901 (Bankr. D. Ariz. 2016). While the Thirteenth Circuit finds support for a *per debtor* approach in Delaware bankruptcy courts, the *per plan* approach is found

to be more persuasive across the nation in the majority of lower courts and has recently been adopted by the Ninth Circuit. *See In re Tribune Co.*, 464 B.R. at 182; *In re Charter Commc'ns*, 419 B.R. at 266; *In re Station Casinos, Inc.*, 2010 WL 11492265, at *23 (Bankr. D. Nev. Aug. 27, 2010); *In re SPGA, Inc.*, 2001 WL 347505646, at *6-7 (Bankr. M.D. Pa. Sept. 28, 2001). Despite the ability and expertise found in Delaware bankruptcy courts, this Court should consider the well-reasoned rationale of the *per plan* approach that has been applied consistently among bankruptcy courts in Pennsylvania to Nevada. *Id.*

A ruling contrary to the *per plan* approach would result in a continued lack consistency among the lower courts and may result in forum shopping among debtors. Anupama Yerramalli, et al., *In This Issue:, First Glance, "Per Plan" or "Per Debtor"?: Transwest Reignites the § 1129(a)(10) Debate*, 39-4 ABIJ 30, 84-85. In adopting the *per plan* approach, this Court therefore resolves judicial inconsistency, prevents forum shopping, and provides flexibility to debtors as they seek to reorganize under Chapter 11.

2. A *Per Plan* Approach Must Be Applied to the Plain Language Of Section 1129(A)(10) Because Under The *Per Debtor* Approach, Debtors May Be Forced Into Liquidation.

The Thirteenth Circuit erred in concluding that 11 U.S.C. §1129(a)(10) must be analyzed on a *per debtor*, not *per plan*, basis because without the application of a *per plan* approach, a debtor's opportunity to reorganize. *In re Transwest Resort Props., Inc.*, 881 F.3d at 729-730. Such a hindrance is significant because the ability to reorganize is not only critical to debtors filing for Chapter 11, but also the goal of Chapter 11. R. 15.*;* See §§1123, 1129, 1141. American bankruptcy law aims to provide debtors with the opportunity to restructure itself while simultaneously protecting the business from creditors. H.R. Rep. No. 95-595, at 5 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6179. Unlike liquidation, reorganization aims to

"restructure a business's finances so they may continue to operate, provide employees with jobs, pay its creditors, and produce a return for its stockholders." *Id.* It follows, that by allowing debtors to reorganize in order to maintain operations, continue to employ workforces, and work towards rising from bankruptcy, the *per plan* approach better aligns with principles of corporate law and 11 U.S.C. §1129(a)(10)'s purpose of promoting successful organization of debtors and fairness to creditors. *In re Loop 76, LLC*, 442 B.R. 713, 722 (Bankr. D. Ariz. 2010) ("There is… no dispute that the sole purpose of 11 U.S.C. §1129(a)(10) was to require "some indicia of creditor support for the debtor[ ]."). The *per debtor* approach effectively impairs the debtors' rights to work towards reestablishment in the corporate arena by allowing creditors to dictate debtors' opportunities to reorganize. *Id.*

In conclusion, this Court should adopt the *per plan* approach because by supporting a *per debtor* approach, the Debtors may be forced to liquidate in Chapter 7 or in the least, be forced to endure dismissal of Development's case, thereby affecting thousands of employees, creditors, and stakeholders. R. 32. Because it is unlikely that Congress intended to deprive employees, stockholders, and creditors of benefits under Chapter 11, it is unlikely that Congress intended to corner debtors by enacting section 1129(a)(10). *In re Loop 76, LLC,* 442 B.R. at 722.

CONCLUSION

WHEREFORE, Petitioner respectfully moves this Court to reverse the decision of the Thirteenth Circuit Court of Appeals.

Respectfully Submitted,

/s/ Team 20P
Counsel for Petitioner

APPENDIX A

11 U.S.C. § 102 (7)

In this title –

(7) the singular includes the plural

APPENDIX B

11 U.S.C. §365 (c)(1)

The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

such party does not consent to such assumption or assignment.

APPENDIX C

11 U.S.C. §1107

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

APPENDIX D

11 U.S.C. §1129 (a)(10)

(a) The court shall confirm a plan only if all of the following requirements are met:

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.